

FEDERAL COURT OF AUSTRALIA

BZE21 v Minister for Immigration, Citizenship and Multicultural Affairs

[2024] FCA 371

Appeal from: BZE21 v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FedCFamC2G 723

File number: QUD 350 of 2022

Judgment of: **RANGIAH J**

Date of judgment: 16 April 2024

Catchwords: **MIGRATION** – appeal against decision of Federal Circuit and Family Court of Australia – whether primary judge erred in finding no jurisdictional error by Administrative Appeals Tribunal – where Tribunal affirmed decision not to grant protection visa – provision of bogus documents – whether Tribunal misapplied s 91WA – whether unreasonable or procedurally unfair for Tribunal to find no reasonable explanation for providing bogus documents – whether Tribunal misinterpreted s 36(3) – appeal dismissed

Legislation: *Migration Act 1958* (Cth) ss 5(1), 36(3), 65, 91W, 91W(1), 91W(2), 91W(2)(d), 91WA, 91WA(1), 91WA(1)(a), 91WA(2) and 487ZJ(1)
Migration Amendment (Protection and Other Measures) Act 2015 (Cth) s 15(3)

Cases cited: *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97
BZE21 v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FedCFamC2G 723
Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Division: General Division

Registry: Queensland

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs:	73
Date of hearing:	26 July 2023
Solicitor for the Appellant:	Ms C Zhao of Australian Migration Lawyers
Counsel for the First Respondent:	Mr JD Byrnes
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

QUD 350 of 2022

BETWEEN: **BZE21**
Appellant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: **RANGIAH J**

DATE OF ORDER: **16 APRIL 2024**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1 A delegate of the first respondent (the **Minister**) refused, under s 65 of the *Migration Act*
1958 (Cth) (the **Act**), to grant the appellant a Protection (Class XA, Subclass 866) Visa. The
second respondent (the **Tribunal**) affirmed that decision.

2 In *BZE21 v Minister for Immigration, Citizenship and Multicultural Affairs* [2022]
FedCFamC2G 723, the appellant's application for judicial review of the Tribunal's decision
was dismissed. The appellant now appeals from that judgment.

3 It is necessary to describe the factual background, the Tribunal's decision and the primary
judge's reasons in order to give context to the grounds of appeal and the parties' submissions.

Background

4 The appellant claims to be a citizen of Somalia. He arrived in Australia on 3 December 2013.
He is now 40 years old.

5 On 17 February 2014, the appellant provided the Minister with his Protection Visa
application and certified copies of what he claimed were his Somali birth certificate and
Somali international driver's licence.

6 On 14 January 2015, a delegate of the Minister invited the appellant to attend an interview
and asked the appellant to bring, amongst other things, all original identity documents held by
him.

7 On 3 February 2015, the appellant attended the interview and provided the originals of the
purported Somali birth certificate and Somali international driver's licence to an officer of the
Department of Immigration and Border Protection (the **Department**).

8 On 5 February 2015, a delegate of the Minister invited the appellant to attend a second
interview. In the invitation, the delegate requested, under s 91W(1) of the Act, that the
appellant produce documentary evidence of his identity, nationality or citizenship. On 18
February 2015, the appellant attended the second interview.

9 On 16 May 2016, an officer of the Department notified the appellant that his Somali birth
certificate and Somali international driver's licence provided on 3 February 2015 had been
seized by the Department under s 487ZJ(1) of the Act. The notification stated that, based on

an assessment of the Somali birth certificate and Somali international driver's licence, it was reasonably suspected that the documents were each a "bogus document" as defined in s 5(1) of the Act, being counterfeit documents.

- 10 On 22 August 2017, the Minister's delegate invited the appellant to comment on information the Department had received which indicated that the appellant was in fact a citizen of Kenya and had permanent residency in South Africa.
- 11 On 13 September 2017, in response to the invitation, the appellant made a statutory declaration explaining how he obtained a false Kenyan passport and annexing documents in support of his claim that he was a Somali citizen.
- 12 On 7 September 2017, the Minister's delegate again invited the appellant to comment on information the Department had received, from which the delegate formed what was said to be a reasonable suspicion that the appellant's identity documents, including his Somali birth certificate and Somali international driver's licence, were bogus documents. The invitation included a warning which stated, "[i]f it is assessed that you have produced a bogus document as evidence of your identity, nationality or citizenship, then your visa application may be refused under section 91WA(1) of the Migration Act".
- 13 On 19 October 2017, the Minister's delegate invited the appellant to provide a reasonable explanation for providing bogus documents as evidence of his identity, nationality or citizenship. The invitation included a warning that if, relevantly, a delegate found that the appellant provided a bogus document as evidence of his identity, nationality or citizenship, the grant of a Protection Visa would be prevented by s 91WA(1) of the Act and his application would be refused unless a delegate was satisfied that he had a reasonable explanation for providing the bogus document.
- 14 On 14 November 2017, the appellant made a statutory declaration explaining how he obtained his identity documents and why his identity documents should not be considered by the Department to be bogus documents.
- 15 On 4 December 2017, the Minister's delegate refused the appellant's application for a Protection Visa. The delegate's reasons stated that he was not satisfied the appellant was a person in respect of whom Australia has protection obligations. The reasons also stated that the delegate was not satisfied the appellant had a reasonable explanation for providing bogus

documents as evidence of his identity. The delegate accordingly refused, under s 91WA(1) of the Act, to grant the appellant a Protection Visa.

16 On 14 December 2017, the appellant lodged an application for review of the delegate's decision. On 2 June 2021, the Tribunal affirmed the decision under review, finding that the grant of a Protection Visa was precluded by s 91WA of the Act.

17 On 1 July 2021, the appellant sought judicial review of the Tribunal's decision in the Federal Circuit and Family Court of Australia. That application was dismissed by the primary judge on 1 September 2022.

The Tribunal's reasons for decision

18 The Tribunal commenced its consideration by identifying the relevant issues, namely:

- (1) whether the appellant met the refugee criterion, and if not, whether he was entitled to complementary protection;
- (2) whether the grant of the visa was prevented by s 91WA(1) of the Act because the appellant had not provided a reasonable explanation for providing a bogus document as evidence of his identity, nationality or citizenship; and
- (3) whether the appellant had a presently existing right to enter and reside in another country, being Kenya or South Africa, and, if he did, whether, under s 36(3) of the Act, Australia was taken not to have protection obligations in respect of the appellant.

19 In respect of the application of s 91WA, the Tribunal found that:

219. ...the birth certificate and driver's licence which were provided, or caused to be provided, to the Department by the applicant purports to have been, but were not, issued in respect of the applicant as contemplated by paragraph (a) of the definition of "bogus document", and that such documents are "bogus documents" for the purposes of that definition in section 5(1) of the Act.

...

236. ...the applicant has knowingly presented a fake birth certificate, and then subsequently a fake driver's licence, in support of his identity which in turn supported an entirely fabricated story as to how he arrived in Australia (after having used a Somali passport to arrive via Istanbul) and a fabricated set of claims.

237. ...the applicant has no reasonable explanation as to why he provided bogus documents, including a counterfeit birth certificate and driver's licence, as evidence of his identity.

20 The Tribunal then concluded that s 91WA(1) of the Act applied to the appellant, such that the grant of a Protection Visa was precluded by that section.

The primary judge's reasons

21 The primary judge observed at [41] that only three issues were truly alive in the proceedings:

- Was it open for the Tribunal to conclude that the Somali birth certificate and the Somali drivers (sic) licence were bogus documents?
- Was it procedurally fair for the Tribunal to come to that conclusion?
- Was it open for the Tribunal to conclude that there was no reasonable explanation for providing the bogus documents?

22 The primary judge found that no real arguments were advanced that it was not open for the Tribunal to conclude that the appellant's identity documents were bogus documents. In addition, the appellant had not argued that it was not open for the Tribunal to conclude that there was no reasonable explanation for providing the bogus documents.

23 The primary judge then considered the appellant's submission that the Tribunal fell into jurisdictional error by relying upon the appellant's identity documents which were, "procured by procedural unfairness".

24 The appellant relevantly submitted that it was procedurally unfair for the Department to rely upon the appellant's identity documents because, when the Minister's delegate made a request to the appellant for identity documents, the appellant was not given a warning pursuant to s 91W(2)(d) of the Act.

25 The primary judge observed that the Tribunal had proceeded on the basis of s 91WA, which was not reliant upon, or referable to, s 91W, finding that:

59 ... As far as s 91WA is concerned, how the provision of documents comes about is not relevant; it is the actual provision that is the focus of the section.

60 For that reason, it was proper for the Tribunal to simply enquire as to whether the Applicant had provided the birth certificate and the drivers (sic) licence. It was irrelevant as to why such documents were provided and certainly it did not matter whether the provision was as part of the original application or in answer to a request pursuant to s 91W.

61 Having come to that conclusion, it cannot be said that the reliance upon these documents by the Tribunal was procedurally unfair. For that reason, there has been no jurisdictional error.

26 The primary judge also noted that none of the other grounds of review could illustrate jurisdictional error because they could not be material given the reasoning of the Tribunal in relation to s 91WA.

27 Accordingly, the primary judge dismissed the application with costs.

The grounds of review

28 During the hearing, the appellant abandoned the grounds of review expressed in his Notice of Appeal and sought to rely on other grounds of review set out in his written submissions.

29 I granted the appellant leave to file an amended Notice of Appeal reflecting the new grounds of review sought to be relied upon. Although the appellant's legal representative undertook to file an amended Notice of Appeal as soon as reasonably practicable, no such document has been filed. It is unacceptable for any legal representative to fail to comply with an undertaking given to the Court.

30 The appellant's outline of submissions contains the following grounds:

Ground 1 The Tribunal misunderstood and misapplied the law of s91WA, and its decision was unlawful

Ground 2. Notwithstanding Ground 1, the finding that the Appellant had no reasonable explanations for providing the bogus documents under s 91WA was flawed, and the Primary judge failed to make a finding.

1) the Tribunal failed to make an independent finding on the Appellant's credibility.

2) The Tribunal failed to afford the Appellant procedural fairness in failing to put the question why he carried his birth certificate around since 2010.

Ground 3. The finding that Kenya is the Appellant's receiving country, the Tribunal misinterpreted the Kenyan authority's report under s 36(3) and failed to assess the legal implications of its decision.

(Errors in original.)

31 It may be observed that there is no contention that the Tribunal made any error in finding that the identity documents provided by the appellant were bogus documents.

Consideration

Ground 1: Whether the Tribunal misunderstood and misapplied the law of s 91WA

32 The appellant's first ground of appeal asserts that the Tribunal misunderstood and misapplied s 91WA of the Act.

33 The appellant submits that s 91WA did not prevent the grant of a Protection Visa. He contends that the language of s 91WA(1)(a) refers to the provision of a bogus document in the present tense ("provides") and, as a result, the provision, which commenced on 18 April 2015, did not apply at the time the appellant provided the bogus documents on 3 February 2015.

34 The Minister contends that s 91WA applied because the appellant's Protection Visa application was not finally determined as at 18 April 2015 and he provided the bogus documents in connection with that application.

35 At the time of the Tribunal's decision, s 91WA provided:

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the

document to be provided, given or presented.

36 Section 91WA of the Act was introduced with effect on 18 April 2015 by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (the **Amending Act**). Section 15(3) of the Amending Act provided, relevantly, that:

15 Application of amendments

...

(3) Sections 91W, 91WA and 91WB of the *Migration Act 1958* as amended by Part 2 of this Schedule apply to an application for a protection visa:

- (a) made on or after the commencement of that Part; or
- (b) made before the commencement of that Part but not finally determined as at the commencement of that Part.

37 In *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, Mortimer and Wigney JJ held at [80]:

The present tense “produces” is used in s 91W(2) and (3), as it is for “provides” in s 91WA(1), (2) and (3). Clearly, however, the text is referring to conduct that does not occur at one particular point in time. It is referring to conduct that occurs, or might occur, over a certain period of time and in conjunction or contemporaneously with another event: namely, the protection visa application and decision-making process. For example, where in s 91WA(2) (the exculpatory provision) the provision posits first a reasonable explanation and then states that an applicant “provides” documentary evidence of her or his true identity, the use of the apparently present tense there must sensibly refer, in fact, to a past event. That is — bogus documents have been provided, they are discovered, an applicant gives an explanation which is satisfactory to the Minister and also “gives” or “presents”, or “provides” evidence of her or his true identity. In reality, this conduct is occurring in the past. However, the text uses the present tense to signify contemporaneity with the process in which the conduct occurs — that is, the protection visa process.

38 Section 15(3) of the Amending Act does not limit the application of s 91WA of the Act by reference to the date any bogus document is provided. Whether s 91WA applies to a protection visa application depends on when the application was made and when it is finally determined.

39 In this case, the Department received the appellant’s application for a Protection Visa on 17 February 2014 and that application had not been finally determined as at the commencement of s 91WA on 18 April 2015. Accordingly, s 91WA of the Act applied to the appellant and there was no error in the decisions of the Tribunal or the primary judge that the section applied to the appellant’s visa application.

40 The appellant also contends that there was non-compliance with the warning requirement under s 91W(2)(d) of the Act and that, as a result, the Tribunal was not permitted to rely upon s 91W to refuse the grant of the Protection Visa.

41 The Minister submits that the appellant's submissions in respect of s 91W are irrelevant and immaterial as the Tribunal's decision was based upon s 91WA and not s 91W. The Minister also submits that there was no practical unfairness to the appellant as he was given warnings on 7 September 2017 and 19 October 2017 that his visa application may be refused if it were assessed that he had provided a bogus document as evidence of his nationality or citizenship.

42 It may be noted that the invitation from the Minister's delegate to the appellant of 5 February 2015 to attend a second interview was made under s 91W(1) of the Act.

43 At the time the Tribunal made its decision, s 91W of the Act relevantly provided:

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:

- (i) produces documentary evidence of his or her identity, nationality or citizenship; or
- (ii) has taken reasonable steps to produce such evidence.

...

44 Importantly, s 91W(2) only applied if each of the matters in paras (a) to (d) applied. There is no suggestion that the appellant either refused or failed to comply with a request or produced bogus documents “in response” to the delegate’s request of 5 February 2015. Rather, the appellant’s bogus documents were provided in response to the delegate’s first invitation to the appellant of 14 January 2015 to attend an interview.

45 In these circumstances, s 91W did not apply to the appellant’s application. It is also clear that the delegate’s decision to refuse the grant of a Protection Visa relied on s 91WA of the Act, and that in affirming that decision, the Tribunal found that the grant of a Protection Visa was precluded by s 91WA of the Act. The Tribunal’s decision was not based on s 91W.

46 For these reasons, the appellant’s first ground of review must be rejected.

Ground 2: Whether the Tribunal’s finding that the appellant had no reasonable explanation for providing the bogus documents under s 91WA was unreasonable and procedurally unfair

47 By its second ground of appeal, the appellant asserts that the Tribunal’s finding that the appellant had no reasonable explanation for providing bogus documents was unreasonable and procedurally unfair because:

- (1) the Tribunal did not make an independent finding as to the appellant’s credibility; and
- (2) the Tribunal did not question the appellant about why he obtained a birth certificate in 2010 and then carried it around with him.

48 The Minister submits that the Tribunal was not required to make a finding as to credibility when determining that the appellant did not have a reasonable explanation for providing bogus documents. Rather, the relevant condition under s 91WA(2) is the decision-maker’s satisfaction, and the Tribunal expressed its finding that it was not so satisfied. Additionally, the Minister submits that any error would be immaterial.

49 The Minister also submits that the Tribunal was not required to question the appellant as to any gaps in his evidence and doubts based on the evidence. The Minister contends that it was

reasonable for the Tribunal to proceed on the basis that the appellant received the birth certificate from his mother in South Africa as he had claimed.

50 In respect of the appellant's complaint that the Tribunal did not make a finding as to his credibility, the Tribunal noted that it had been made clear to the appellant that the credibility of his various explanations as to how he had acquired his identity documents was in issue. The Tribunal stated:

222. The applicant provided a number of explanations at the hearing as to which identity he used when and for what purposes. He claims though that the name used in his protection visa application is his true identity.

...

227. When asked specifically for an explanation as to why he used a false passport and identity to enter Australia, the applicant has offered multiple explanations as to the passports he had acquired and used that got him from Kenya to South Africa and then to Australia.

228. When asked specifically for an explanation as to why he used a fake birth certificate as proof of his identity when making his protection visa application he has offered statements that he believed them genuine and that his mother obtained his birth certificate for him and believed she had "done it the right way".

229. When asked specifically for an explanation as to why he used a fake driver's licence as proof of his identity when making his protection visa application he has offered statements that he thought he had to provide identification with a photo on it, and he recalled that he had a driver's licence back in Somalia with a photo on it. When asked whether he had completed a driving test to obtain the licence, he replied that he didn't, but that he got his licence the way everyone got everything in Somalia, by paying someone for it.

230. The Tribunal made it clear to the applicant from the commencement of the hearing that on the strength of the various explanations as to his identity, and passport acquisitions, made to the delegate, that his credibility was in issue.

231. At the time of his attaining the birth certificate from his mother in 2010, the applicant was living as a permanent resident in South Africa. He had a Kenyan passport and Kenyan identity which he freely admits to using and which he did use to obtain his South African residency. He was not yet considering traveling beyond South Africa, which it is claimed he started to consider in 2013. The Tribunal could not find a plausible explanation as to why he attained a birth certificate in 2010 and then carried it around with him from 2010. When asked why he didn't carry his Somalian international driver's licence around with him, he replied that he didn't need it as he had a Kenyan one.

232. The applicant admitted to the delegate that his protection claims made in his protection visa application were fabricated.

...

235. The Tribunal has considered country information relating to Somalia and

noted the fact of the civil war, the reason claimed by the applicant for his fleeing to Kenya in 2006. However, the applicant has not sought to explain the acquisition of the counterfeit birth certificate by his mother in 2010 in this way.

236. The Tribunal is satisfied that the applicant has knowingly presented a fake birth certificate, and then subsequently a fake driver's licence, in support of his identity which in turn supported an entirely fabricated story as to how he arrived in Australia (after having used a Somalian passport to arrive via Istanbul) and a fabricated set of claims.

51 It may be observed that the Tribunal made a specific finding that it was satisfied the appellant, "has knowingly presented a fake birth certificate, and then subsequently a fake driver's licence". The Tribunal then found at [237] that it was satisfied that the appellant, "has no reasonable explanation as to why he provided bogus documents, including a counterfeit birth certificate and driver's licence, as evidence of his identity".

52 Section 91WA of the Act relevantly required the Tribunal to refuse to grant the Protection Visa to the appellant unless it was satisfied the appellant had a reasonable explanation for providing bogus documents. It is clear from the Tribunal's reasons that it did not accept his various explanations to be credible. The Tribunal was not satisfied that the appellant had any reasonable explanation as to why he provided bogus documents. The appellant has not demonstrated any error in the Tribunal so finding.

53 The appellant also complains that the Tribunal did not question him about why he obtained a birth certificate in 2010 and carried it around with him. The appellant contends that this issue, "ultimately led the Tribunal to conclude that the birth certificate was fraudulent, serving as the essential factor in determining the Appellant's ineligibility for the grant of a protection visa".

54 Pursuant to s 91WA, the Tribunal was required to determine, relevantly:

- (1) whether the appellant provided bogus documents as evidence of his identity, nationality or citizenship; and
- (2) if so, whether the appellant had a reasonable explanation for providing bogus documents.

55 In respect of the first issue, the Tribunal asked the appellant whether he was maintaining that the birth certificate was genuine. The appellant replied that he did not really know whether the documents were genuine and did not provide further information, except to explain that

he obtained the birth certificate from his mother in 2010 and believed she, “had done it the right way”.

56 The Tribunal noted that documents submitted by the appellant which sought to explain how he obtained his identity documents did not make reference to his birth certificate and did not comment on the validity of the identity documents he provided to the Department. The Tribunal considered that his explanations did not, “outweigh the forensic findings of the department as to the fact his birth certificate ...[is] counterfeit”.

57 The Tribunal then found that the birth certificate was a bogus document. This finding was not premised on any consideration about the reason why the appellant obtained the birth certificate in 2010 and carried it around with him since then.

58 Having found that the birth certificate was a bogus document, the Tribunal was then required to determine whether the appellant had a reasonable explanation for providing the bogus document.

59 The appellant was, “asked specifically for an explanation as to why he used a fake birth certificate as proof of his identity when making his protection visa application”. The evidence of the appellant was simply that he believed the birth certificate was genuine and that his mother had obtained it for him in, “the right way”.

60 The Tribunal also considered country information relating to Somalia and the fact of the civil war, and noted that the appellant had not, “sought to explain the acquisition of the counterfeit birth certificate by his mother in 2010 in this way”.

61 It is clear from the Tribunal’s reasons that the appellant was given the opportunity to provide an explanation for providing the bogus birth certificate before the Tribunal made its finding that the appellant knowingly presented a fake birth certificate. There was no denial of procedural fairness as contended for by the appellant.

62 In any event, questioning the appellant about why he obtained a birth certificate in 2010 and carried it around with him could not have made any difference to the outcome given the Tribunal’s findings in respect of the bogus driver’s licence.

63 It may also be noted that, for a decision to be unreasonable, it must be one that “lacks an evident and intelligible justification”: see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76]. That may be so where a decision is one which no reasonable

person could have arrived at, and, while this test cannot be applied in every case, it serves to highlight that the test for unreasonableness is necessarily stringent: see *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [10]–[11]. The Tribunal’s reasons were logical and its findings were open to it. It was not a decision that no reasonable person could have made. The decision was not legally unreasonable.

64 Accordingly, the appellant’s second ground of review has not been established.

Ground 3: Whether, in finding that Kenya is the Appellant’s receiving country, the Tribunal misinterpreted the Kenyan authority’s report and failed to assess the legal implications of its decision

65 By his third ground of appeal, the appellant asserts that it was not open for the Tribunal to find that the appellant’s receiving country was Kenya on the material before it. The appellant also submits that the Tribunal misinterpreted s 36(3) of the Act by interpreting the term “right to enter” to mean a right that is “genuinely given”, rather than “lawfully given”.

66 The Minister submits that the Tribunal had material before it that permitted it to find that the appellant’s nationality was Kenyan and that his receiving country was Kenya. The Minister also contends that the Tribunal did not have to determine the application of s 36(3) given its conclusion on s 91WA, which provided an independent dispositive basis for the refusal of the appellant’s Protection Visa application.

67 The Tribunal had material before it that supported its finding that the appellant’s receiving country was Kenya. Departmental investigations had revealed that the appellant arrived in Australia using a Kenyan passport. Further, the Department received confirmation from Kenyan authorities that the appellant’s passport was genuinely issued to him.

68 The appellant’s submissions as to s 36(3) of the Act are difficult to understand. The appellant submits that the Tribunal’s determination as to s 36(3) was, “legally unsound or implausible considering the available evidence and circumstances... because the Appellant discarded his Kenyan passport shortly after arriving in Australia and lacks any other valid Kenyan identification documents”.

69 The appellant also contends that, “it would be legally impossible for him to claim Kenyan citizenship as he cannot speak the Kenyan language and no Kenyan nationals would be able to testify on his behalf”, and that, in the result, the Tribunal, “failed to consider the legal consequences of finding that the Appellant is a Kenyan national”.

70 The appellant’s oral submissions before the Court did not assist in explaining or clarifying this contention. The submissions also appeared to impermissibly challenge the merits of the Tribunal’s determination.

71 The Tribunal’s reasons clearly disclose that it did not make a determination under s 36(3) as to whether Australia is taken not to have protection obligations in respect of the appellant. While it referred to the section, the Tribunal, “put that issue to one side for the moment”, before considering whether the grant of the Protection Visa was prevented by s 91WA. As the Tribunal was satisfied that s 91WA(1) prevented the granting of the Protection Visa, it did not return to make a determination as to s 36(3).

72 The appellant’s third ground of review must be rejected.

Conclusion

73 The appellant has not established any of his grounds of appeal. The appeal must be dismissed with costs.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 16 April 2024